

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

SIMPSON AND BROWN, INC.

Employer

and

Case 22-RC-264640

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION NO. 469**

Petitioner

DECISION AND DIRECTION OF ELECTION

Simpson and Brown, Inc. (the Employer) is engaged in the provision of marine and heavy civil construction services.¹ International Brotherhood of Teamsters Local Union No. 469 (the Petitioner) seeks to represent the following bargaining unit:

INCLUDED: All full-time and regular part-time truck drivers employed by the Employer at its 119 North Avenue West, Cranford, New Jersey facility.

EXCLUDED: All office clerical employees, dispatchers, trade employees, yard employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

The parties stipulate, and I find, that this unit is appropriate.

The parties have agreed that one individual, Christopher Krukosky, will vote subject to challenge. Krukosky's eligibility remains unresolved.

The only matter at issue is whether to conduct a manual or mail ballot election. No issues were litigated at the hearing.²

¹ The parties' full and correct names appear as amended.

² The petition in this case was filed under Section 9(c) of the Act. The parties were provided opportunity to present evidence on the issues raised by the petition at a hearing held by teleconference before Hearing Officer Anett Rodrigues of the National Labor Relations Board (the Board). I have the authority to hear and decide this matter on behalf of the Board under Section 3(b) of the Act. I find that the hearing officer's rulings are free from prejudicial error and are affirmed; that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction; that the Petitioner is a labor organization within the meaning of the Act; and that a question affecting commerce exists concerning the representation of certain employees of the Employer. The parties waived the right to submit post-hearing briefs.

The Employer takes the position that the election should be conducted manually. Specifically, the Employer proposes that the election should be held in the employees' break room between 5:30 a.m. and 6:30 a.m. The Employer will provide supplies including masks, soap, water, hand sanitizer, paper towels, tissues, and disinfecting wipes. The Employer regularly cleans its premises and encourages employees to engage in social distancing and proper use of masks.

The Petitioner does not object to the Employer's proposal.

I have carefully considered the positions and arguments presented by the parties. As fully discussed below, even though the parties prefer a manual election, and even though a manual election would be preferable in the absence of the COVID-19 pandemic, I have directed a mail ballot election. This is the most appropriate method of conducting a prompt election in view of the extraordinary circumstances presented by the pandemic. A mail ballot election will enfranchise the employees and protect the health of the voters, party representatives, Board agents, and the general public.

The Employer is located in Cranford, New Jersey, less than twenty miles from New York City, the initial epicenter of the COVID-19 pandemic in the United States. On August 31, 2020, Union County, in which Cranford is located, reported 24 new positive cases; 17,103 total positive cases; 1,185 confirmed deaths; and 166 probable deaths. For the week ending on August 22, the New Jersey Department of Health Communicable Disease Service characterized the level of COVID-19 activity in Union County as "moderate." The public health emergency and state of emergency declared by New Jersey Governor Phil Murphy on March 9 remain in effect. As of September 14, New Jersey was the state with the eighth highest number of confirmed cases of COVID-19 at 196,634 according to the Centers for Disease Control.³

In response to the evolving realities of the pandemic, on July 6 the Office of the General Counsel issued Memorandum GC 20-10, Suggested Manual Election Protocols. The suggested protocols include polling times sufficient to accommodate social distancing without unnecessarily elongating exposure among Board agents and observers; the employer's certification in writing that polling area is consistently cleaned in conformity with CDC standards; a spacious polling area, sufficient to accommodate six-foot distancing; separate entrances and exits for voters; separate tables spaced six feet apart; sufficient disposable pencils without erasers for each voter to mark his or her ballot; glue sticks or tape to seal challenged-ballot envelopes; plexiglass barriers of sufficient size to protect the observers and Board agents; and masks, hand sanitizer, gloves and disinfecting wipes. Memorandum GC 20-10 further requires an employer's written certification of how many individuals have been present in the facility within the preceding 14 days who have tested positive for COVID-19; who have been directed by a medical professional to proceed as if they have tested positive for COVID-19; who are awaiting results of a COVID-19 test; who are exhibiting symptoms of COVID-19; or who have had direct contact with anyone in the previous 14 days who has tested positive for COVID-19.

³ https://covid.cdc.gov/covid-data-tracker/#cases_totalcases

Happily, the Employer is able to note that although it has remained in operation throughout the pandemic, it has not documented a single transmitted case of COVID-19. As discussed above, the Employer is willing to take steps to ensure that the polling area is clean and that those who must enter the polling area will be equipped with personal protective equipment. However, the Employer continues to operate in a densely populated area with a significant COVID-19 transmission rate. Even if the Employer were to issue written assurances that, for example, no individuals who have been present in the facility in recent weeks have tested positive for COVID-19, the usefulness of such certifications is questionable. The CDC has stated that its “current best estimate” is that 50 percent of COVID-19 transmission occurs prior to the onset of symptoms, and that 40 percent of people with COVID-19 are asymptomatic. However, the CDC also recognizes that these estimates remain uncertain.⁴ In a state that has experienced high numbers of individuals testing positive for COVID-19, as is the case with New Jersey, the current data on transmission of this illness without symptoms is troubling.

The Board, in *San Diego Gas and Electric*, 325 NLRB 1143 (1998), reviewed the circumstances under which it may be appropriate to direct a mail ballot election. The Board’s longstanding policy has been that, as a general rule, representation elections should be conducted manually. Recognizing, however, that there are some extraordinary circumstances that would make it difficult for eligible employees to vote in a manual election, the Board has vested Regional Directors with broad discretion to determine the method by which elections shall be conducted. When these situations exist, the Regional Director, in the exercise of discretion, should also consider the desires of the parties and the efficient use of Board resources.

Over the past six months, the Board has consistently found that the present pandemic constitutes an extraordinary circumstance pursuant to *San Diego Gas and Electric* when denying parties’ requests for review with respect to this issue. For example, in *Atlas Pacific Engineering Company*, Case 27-RC-258742 (May 8, 2020), the Board, in denying the employer’s request for review, stated that the COVID-19 pandemic constituted extraordinary circumstances warranting a mail ballot where federal, state, and local government directives had limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting the election should remain on mandatory telework. Likewise, in *Johnson Controls, Inc.*, Case 16-RC-256972 (May 18, 2020), the Board denied review of that region’s decision to conduct a mail-ballot election, even though the employer had zero COVID-19 cases; daily screened all individuals accessing the facility for symptoms; mandated face coverings and social distancing; and offered an outdoor election with plexiglass barriers, sanitizer, single-use writing utensils, floor markings for social distancing, masks, and gloves. Finally, in *Brink’s Global Services USA, Inc.*, Case 29-RC-260969 (July 14, 2020), the Board addressed a mail-ballot determination in the context of the pandemic and with consideration of General Counsel Memorandum GC 20-10 (issued July 6, 2020). In denying review, the Board stated at footnote 2 that it “will continue to consider whether manual elections should be directed based on the circumstances then prevailing in the region charged with conducting the election, including the

⁴ “COVID-19 Pandemic Planning Scenarios,” updated September 10, 2020.
<https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (last visited 9/15/2020).

applicability to such a determination of the suggested protocols set forth in GC Memorandum 20-10.”

I conclude that, under these circumstances, a mail ballot election is appropriate. Given the well-documented presence of COVID-19 in the area surrounding the Employer’s facility and the possibility of asymptomatic spread, the risk of spreading the disease to employees during the election, and to non-employee participants, is too great at this time. A mail ballot election has no apparent significant drawbacks, and indeed neither the Employer nor the Petitioner raised any specific concerns about the possibility of a mail ballot election during the hearing. A mail ballot election will enfranchise all voters and, importantly, will protect the health of voters, party representatives, Board agents, and the public.

Conclusion

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Also eligible to vote using the Board’s challenged ballot procedure is employee Christopher Krukosky, whose eligibility remains unresolved as specified above and in the Notice of Election.

Employees will vote whether or not they wish to be represented for purposes of collective bargaining by INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 469.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. On **October 6, 2020**, ballots will be mailed to voters by National Labor Relations Board, Region 22. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 22 office by close of business on **October 27, 2020**.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by October 15, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 22 Office at (862) 229-7039 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities including but not limited to Shelter in Place orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually, on a platform (such as ZOOM, Skype, WebEx, etc.) on a date and at a time to be

determined by the Regional Director, between November 10 and November 16, 2020. Each party will be allowed to have one designated official observer attend the virtual ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **TUESDAY, SEPTEMBER 15, 2020**, the payroll period immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military service of the United States may vote by mail in the same manner and pursuant to the same voting schedule as established herein for all other Unit employee voting.

Also eligible to vote using the Board's challenged ballot procedure is/are those individual(s) employed in the classifications whose eligibility remains unresolved as specified above and in the Notice of Election.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters. Regarding the voter(s) whose eligibility status is unresolved, the submitted list must specify this individual's name and other information in a separate section.

To be timely filed and served, the list must be *received* by the regional director and the parties by **September 21, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the

equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Notices of Election will be electronically transmitted to the parties, if feasible, or by overnight mail if not feasible. Section 102.67(k) of the Board's Rules and Regulations requires the Employer to timely post copies of the Board's official Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted. You must also distribute the Notice of Election electronically to any employees in the unit with whom you customarily communicate electronically. In this case, the notices must be posted and distributed no later than 12:01 a.m. on **OCTOBER 1, 2020**. If the Employer does not receive copies of the notice by September 29, 2020, it should notify the Regional Office immediately. Pursuant to Section 102.67(k), a failure to post or distribute the notice precludes an employer from filing objections based on nonposting of the election notice.

To make it administratively possible to have election notices and ballots in a language other than English, please notify the Board agent immediately if that is necessary for this election. Also, if special accommodations are required for any voters, potential voters, or election participants to vote or reach the voting area, please tell the Board agent as soon as possible.

Please be advised that in a mail ballot election, the election begins when the mail ballots are deposited by the Region in the mail.

RIGHT TO REQUEST REVIEW

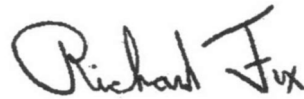
Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for

review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: September 17, 2020.



RICHARD FOX
ACTING REGIONAL DIRECTOR
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